Petition

NO. 81-237

Office-Supreme Court, U.S.
FILED
AUG 5 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ARLIE KNIGHT,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Trial Court's midtrial dismissal of the case for the prosecution's failure to show venue, which is a jury issue, bar retrial of the petitioner under his Fifth Amendment right against double jeopardy?

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ARLIE KNIGHT,
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v.

STATE OF TENNESSEE,
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On Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

The Opinion of the Supreme Court of Tennessee (App., *infra*, p. A-1) is reported as *State v. Knight*, 616 S.W.2d 593 (Tenn. 1981).

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered May 11, 1981. The order of said court denying

the petitioner a rehearing was entered on June 8, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in material part, as follows:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged in a state indictment with embezzlement in Knox County, Tennessee. During his trial before a jury, before the prosecution had rested, the trial court, *sua sponte*, dismissed the indictment upon the ground that venue was shown to be in another county. Before this ruling, the prosecutor argued that venue in Knox County was proper, but petitioner's counsel did not argue this point. Instead, he repeatedly sought a judgment of acquittal because of a claimed fatal variance between the proof and the allegations of the indictment.

Petitioner's counsel never made a motion for dismissal on grounds of improper venue, but he continued to pursue an acquittal. However, upon the trial court's refusal to grant his request for an acquittal and its dismissal of the case because of lack of venue, counsel stated, "The defendant excepts to the Court's ruling, not as to the venue question, but as to the indictment."

The respondent appealed the dismissal to the Court of Criminal Appeals of Tennessee. As noted in the Court of Criminal Appeals' opinion (App., pp. A-19—A-20), petitioner asserted that respondent had no right to appeal, nor could there be a retrial, since the trial court's action constituted an acquittal which would bar another trial under the Fifth Amendment to the United States Constitution. The Court of Criminal Appeals held that the trial court was in error on the venue question and that the dismissal for lack of venue was not an acquittal. Further, as to the petitioner's claim that the dismissal was without manifest necessity, the court stated that the petitioner consented to the dismissal. (App., p. A-23) It reversed and remanded the case for a new trial.

The Supreme Court of Tennessee granted petitioner's application for permission to appeal to consider whether or not another trial would violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. (App., p. A-2) The Supreme Court, with one dissent, affirmed the remand and held that dismissal for lack of venue did not amount to an acquittal (App., p. A-9) and that petitioner consented to the erroneous dismissal. (App., pp. A-8—A-9) The gist of the dissent was that petitioner's counsel neither sought nor consented to dismissal for lack of venue considering the fast pace of the entire colloquy and counsel's sole thrust being directed at another issue. (App., p. A-15)

REASONS FOR GRANTING THE WRIT

I

SINCE A JURY IN TENNESSEE CAN ACQUIT IF THERE BE INSUFFICIENT EVIDENCE OF VENUE, A SIMILAR MIDTRIAL FINDING BY THE TRIAL COURT CONSTITUTES AN ACQUITTAL AND THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL.

Article 1, §9 of the Constitution of Tennessee provides that an accused has the right to trial "by an impartial jury of the County in which the crime shall have been committed . . . ." It has been held that such venue is constitutionally required to be proven by the prosecution in every criminal case in Tennessee. *See Harvey v. State*, 213 Tenn. 608, 376 S.W.2d 497, 498 (1964).

Further, in Tennessee, if the jury determines that there is insufficient evidence of venue, it is entitled to acquit an accused and it should be instructed as to such

duty, as shown by The Committee on Pattern Jury Instructions of the Tennessee Judicial Conference:

> The burden is upon the state to prove by a preponderance of the evidence that this offense was committed in _____ County, Tennessee. Proof by a preponderance of the evidence means that the greater weight of the evidence must be in support of the state's contention.
>
> * * *
>
> If you find that the state has failed to prove by a preponderance of the evidence that this offense was committed in _____ County, Tennessee, then you must return a verdict of not guilty.

T.P.I.--CRIM. (1st Ed. 1978), §2.05. In this regard, the importance of the venue requirement and the effect of insufficient evidence of venue in Tennessee is similar to the federal venue requirements under the Sixth Amendment to the United States Constitution. *See United States v. Walden*, 464 F.2d 1015 (4th Cir. 1972); *Moran v. United States*, 264 F.2d 768, 770 (6th Cir. 1920).

Petitioner respectfully submits that, in Tennessee, the fact that venue is submitted to the jury for determination and that the jury is legally entitled to acquit because of insufficient venue renders such a determination, be it by the jury or the trial court, "a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Thus, the Fifth Amendment bars retrial after such a determination.

Analogous is the issue of entrapment. The reasoning of the Supreme Court of Tennessee in its opinion could

logically be a[illegible] to allow a retrial if a trial court erroneously dismissed a case on the grounds of entrapment. That is, since entrapment is not an "element" of the offense, then its resolution in favor of the accused does not constitute an acquittal. Obviously, though, a finding of entrapment does involve a "'legal determination on the basis of facts adduced at the trial relating to the general issue of the case.'" *United States v. Sisson*, 339 U.S. 267, 290 n. 19 (1970). The same applies with the issue of venue.

The holding of *United States v. Scott*, 437 U.S. 82 (1978), is inapplicable to this case since *Scott* dealt with the trial court's erroneous determination of an issue which was never contemplated to be submitted to the jury. Simply put, petitioner submits that resolution in favor of an accused of any issue which may be submitted to the trier of fact and upon which the trier is legally entitled to acquit constitutes a bar to reprosecution under the Double Jeopardy Clause regardless of the issue being called an "element" of the offense or not. Petitioner should not be subjected to a second trial since a jury issue was resolved, even if erroneously, by the trial court in his favor. *See Sanabria v. United States*, 437 U.S. 54 (1978). To hold otherwise would expose all criminal defendants to second trials even though they had nothing to do with the prosecution electing to proceed in the wrong forum.

II

THERE WAS NO MANIFEST NECESSITY FOR THE MIDTRIAL DISMISSAL OF THE CASE AND THE DOUBLE JEOPARDY CLAUSE PROHIBITS RETRIAL.

In the instant case jeopardy attached once the jury was impaneled and sworn. *Crist v. Bretz*, 437 U.S. 28 (1978). Under such circumstances, even if there be no "acquittal", the termination of a trial by the trial court may bar retrial in certain instances. *See Gori v. United States*, 367 U.S. 364 (1961); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824).

The petitioner submits that retrial is barred because there was no manifest necessity for the *sua sponte* dismissal of his case by the trial court. Petitioner did not request a mistrial, *United States v. Dinitz*, 424 U.S. 600 (1976), nor did he move for dismissal, *United States v. Scott*, 437 U.S. 82 (1978), nor did he or his counsel do anything to taint the proceedings, *Arizona v. Washington*, 434 U.S. 497 (1978). As shown in the dissent to the majority opinion of the Supreme Court of Tennessee, petitioner's counsel was participating in a fast paced dialogue in which his attention was focused on seeking an acquittal on another issue. Counsel was well aware that jeopardy had attached and he was striving to end the prosecution once and for all by seeking an acquittal.

It is apparent that the trial court was going to dismiss the case regardless of the position taken by counsel. *See State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (1975). To require petitioner's counsel to make a formal objection under the circumstances would effectively place form over substance. Petitioner submits that retrial of him

in this case is barred by the Double Jeopardy Clause under the authority of *Crist v. Bretz*, 437 U.S. 28 (1978), and *United States v. Jorn*, 400 U.S. 470 (1971).

CONCLUSION

A writ of certiorari should issue to the Supreme Court of Tennessee and said court's judgment in this case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari on behalf of the Petitioner, Arlie Knight, have been forwarded, by first class mail, postage prepaid, to the Honorable William M. Leech, Jr., Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219.

This day of August, 1981.

JOSEPH M. TIPTON

Appendix

[616 S.W.2d 593 (Tenn. 1981)]

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, *Plaintiff-Appellee,*	
vs.	Knox Criminal
ARLIE KNIGHT, *Defendant-Appellant.*	Hon. Joseph R. Nigro, Judge

(Filed May 11, 1981)

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James A. H. Bell
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OPINION

AFFIRMED HARBISON, C.J.

[2]

During defendant's trial before a jury upon an indictment for embezzlement, the trial judge, *sua sponte*, decided that

the venue was improper and dismissed the indictment. Upon appeal by the State, the Court of Criminal Appeals held that the venue was proper and that the trial judge was in error in ordering a dismissal. It remanded the case for retrial. This Court granted the defendant's application for permission to appeal to consider his contention that another trial under these circumstances would violate the double jeopardy clauses of the constitutions of Tennessee and of the United States.

The appellant, Arlie Knight, delivered and sold ice cream products for a company having its offices in Knox County. His sales route was in adjacent Blount County. Upon completing a sale, appellant was required to write a receipt or sales ticket, leaving one copy with the customer and accounting for the sale by returning the original at the end of each day to his employer's offices in Knox County.

Appellant was indicted in Knox County for embezzlement. T.C.A. § 39-4232. A jury was impaneled and sworn, and the State offered its first witness, Mr. James Alexander, president of appellant's employer. This witness testified that appellant received the ice cream products each day in Knoxville before servicing his Blount County route. Appellant allegedly presented false sales tickets or receipts for two supermarkets located in Blount County. He delivered the originals of these tickets to the home office in Knoxville at the end of the day.

At the conclusion of the cross-examination of this witness, the trial judge asked the jury to retire. He stated

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that he would like to "hear from the attorneys" on the issue of venue, which had not previously been raised. The prosecutor argued that venue in Knox County was proper. Defense counsel did not meet this issue squarely; instead

he urged that a judgment of acquittal should be entered because of an alleged fatal variance between the elements of the crime charged in the indictment and the evidence offered by the State. He did not expressly make a motion for dismissal on grounds of improper venue. However, in the course of his argument, defense counsel stated:

> "Now he cannot show that any of these elements happened in Knox County, Tennessee. We say the State hasn't got a case in Blount or Knox County as a result of this indictment . . . ."

The trial court denied defense counsel's motion for acquittal on grounds of a variance. He stated, however, with respect to the venue question:

> "I don't believe that the State has proved venue in Knox County but it has proved venue in Blount County. Because of that, without even a motion, the Court would have to say that we are in the wrong county trying this."

During further argument on the issue, counsel for the defendant renewed three times his motion for judgment of acquittal on the ground of a variance. Counsel stated, "Your Honor, we are insistent that the Court enter a judgment of acquittal." The Court replied:

> "I am not going to enter a judgment of acquittal. I am going to dismiss the case on the fact that the state is in the wrong [county]."

Counsel for defendant stated:

> "The defendant excepts to the Court's ruling, not as to the venue question, but as to the indictment."

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Defense counsel did not at any time object to the dismissal of the indictment for improper venue.

Preserving prior statutory rules on the same subject, the Tennessee Rules of Criminal Procedure provide for concurrent venue in different counties if one or more elements of an offense are committed in one county and other elements in another. Tenn. R. Crim. P. 18(b). A single element may occur in more than one county.

Embezzlement is defined by statute as (1) a fraudulent (2) conversion to one's own use (3) by an officer, employee or clerk (4) of money or property (5) in his possession or care by virtue of his employment. T.C.A. § 39-4232.

The trial judge was correct in concluding that venue could have been laid in Blount County. By virtue of his employment, appellant received the proceeds of sales of products in that county. In addition, the conversion may have occurred in that county, since appellant sold the goods and allegedly falsified the receipts and converted the money. Also, the element of fraudulent intent may have been evidenced by appellant's actions in Blount County.

On the other hand, however, additional elements of the crime clearly occurred or continued to exist in Knox County. The conversion may just as reasonably be viewed as having occurred there, since appellant allegedly failed to account there for the funds which he had received. *See Hopper v. State*, 205 Tenn. 246, 326 S.W.2d 448 (1959) (county employee cashed embezzled checks outside the county and failed to account for them inside the forum county); *Lambeth v. State*, 3 Tenn. Cas. (3 Shannon) 754 (1877) (railway express company employee took custody of

packages in Mississippi and failed
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to account for them upon arrival in Tennessee). Further, the employer's Knox County offices were the site of the employment relationship. The alleged element of fraudulent intent was also evidenced by appellant's actions in Knox County.

Since there was concurrent venue in Knox and Blount County, we agree with the Court of Criminal Appeals that the case was incorrectly dismissed.

With respect to appellant's objection to a retrial, it is clear that jeopardy attaches once a jury is impaneled and sworn in a court having jurisdiction. *Crist v. Bretz*, 437 U.S. 28 (1978).[1] The essence of the prohibition against double jeopardy is not that a defendant may incur a greater risk of being found guilty in a second trial than he had in the first, or that the second trial may be conducted prejudicially, but rather that he would risk conviction for an offense for which he has already been placed on trial and in jeopardy. *Abney v. United States*, 431 U.S. 651 (1977); *Price v. Georgia*, 398 U.S. 323, 326 (1970).

The United States Supreme Court has explained the principle as follows:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well

as enhancing the possibility that even though innocent, he may be found guilty." *Abney, supra*, at 661-62, quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957).

---

[1]Of course, any ruling that in substance amounts to an acquittal triggers the protection against double jeopardy and bars retrial. See Burks v. United States, 437 U.S. 1 (1977); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Green v. United States, 355 U.S. 184 (1957); Benton v. Maryland, 395 U.S. 784 (1969); Whitwell v. State, 520 S.W.2d 338 (Tenn. 1975). The Court of Criminal Appeals correctly held in this case that the dismissal for lack of venue was not a ruling on the sufficiency of the evidence or on the merits of the case and did not amount to an acquittal.

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Since the jury had been impaneled and sworn and the first witness had testified, appellant clearly was placed in jeopardy in the present case.

Nevertheless, there are exceptions to the prohibition against double jeopardy. Retrial may be permitted if the termination of the proceedings was caused by error or misconduct of the defense counsel and there was no feasible alternative to halting the proceedings. For example, improper remarks by defense counsel that could taint the outcome of the case have been held to necessitate retrial. *See Arizona v. Washington*, 434 U.S. 497 (1978); *United States v. Dinitz*, 424 U.S. 600 (1976). In the present case, the dismissal was not caused by misconduct on the part of appellant or of his attorney.

Retrial is also permissible, however, if the defendant through his counsel actively sought or consented to premature termination of the proceedings. *United States v. Scott*, 437 U.S. 82 (1978); *Seiber v. State*, 542 S.W. 2d 381, 385 (Tenn. Crim. App. 1976). In such a case the

accused has deliberately elected to forego his right to have guilt or innocence determined by the first trier of fact. Thus, in *United States v. Scott*, *supra*, where counsel moved to dismiss two counts of an indictment on the ground that defendant was prejudiced by pre-indictment delay, and where the motion was granted at the end of trial, a subsequent trial for those charges was held not to be barred upon principles of double jeopardy.

The Court of Criminal Appeals held that the present case was governed by *United States v. Scott*, *supra*. After careful consideration, we are of the opinion that its decision was correct. Although defense counsel did not actually seek

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dismissal upon grounds of improper venue, he did in fact seek dismissal upon other grounds and, at a minimum, cannot be said to have objected to the erroneous action of the court in dismissing for lack of venue. Indeed, at one point, he concurred therein and urged that no elements of the crime had been shown to have been committed in the county where the indictment was returned. Certainly counsel sought to have the prosecution dismissed on grounds not involving guilt or innocence. He actively sought such dismissal and in no sense did he seek to preserve appellant's right to have trial on the merits occur before the jury which had been impaneled to try the case.

The trial judge apparently interrupted the State's case in chief before the State had rested. He abruptly dismissed the prosecution without hearing all of the State's proof, upon grounds of improper venue. Although defense counsel apparently acquiesced in this action and at one point seemed to join in it, his primary insistence was that there was a fatal variance between the indictment and the

proof -- another ground which would not have involved guilt or innocence and which would not have prevented a retrial had it been granted. *See State v. Brooks*, 224 Tenn. 712, 462 S.W.2d 491 (1970), *appeal dismissed sub nom. Duncan v. Tennessee*, 405 U.S. 127 (1972); *Wilson v. State*, 200 Tenn. 309, 292 S.W.2d 188 (1956). In the *Brooks* case, *supra*, the case had gone to trial, proof had been introduced and the trial judge had then dismissed the proceedings because he found a fatal variance between the indictment and the proof. Defendant was then retried and convicted. The Court of Criminal Appeals held that the second prosecution was barred on principles of double

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jeopardy. This Court reversed, and the United States Supreme Court, after granting certiorari, dismissed the appeal upon the ground that the case primarily involved "rules of criminal pleading peculiar to the State of Tennessee" rather than principles of double jeopardy.

In the present case the motion of counsel for the defendant was as improper as the action of the trial judge, inasmuch as the State had not closed its case. At that point the defendant sought dismissal of the indictment and of the trial in Knox County upon grounds which would not have prevented his retrial. We therefore are constrained to the view that he did indeed "consent" to the dismissal and desire to obtain it, even though the trial judge acted upon a different ground. As previously stated, the record shows that counsel for appellant did not except or otherwise object to the venue ruling made by the trial judge.

Jeopardy had attached in this case and the accused had the right, if he had insisted upon it, to have the case proceed to a conclusion on the merits. When he joined in and actively sought dismissal, however, it does not seem to us

that he is entitled to rely upon principles of double jeopardy. As stated by the United States Supreme Court in *United States v. Scott*, 437 U.S. 82 (1978), the concept of double jeopardy rests upon the principle that the state should not be allowed to make repeated efforts to convict an individual for an alleged offense. In the *Scott* case, the Court said:

> "But that situation is obviously a far cry from the present case, where the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first impaneled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence.
>
> [9]
>
> This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." 437 U.S. at 96.

The judgment of the Court of Criminal Appeals is affirmed. The cause is remanded for trial on its merits in Knox County, where it originated and where venue was properly laid.

Costs incident to the appeal are taxed to appellant, Knight. All other costs will abide the results in the trial court.

/s/ WILLIAM J. HARBISON
William J. Harbison, C.J.

Fones, Cooper and Drowota, JJ., concur;
Brock, J., dissents.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, *Appellee*,	)	Appeal by Permission From the Court of Criminal Appeals
v.	)	
ARLIE KNIGHT, *Appellant*.	)	Appeal From the Criminal Court of Knox County
	)	Hon. Joseph R. Nigro, Judge

(Filed May 11, 1981)

DISSENTING OPINION

I respectfully dissent.

Defendant was indicted in Knox County for embezzlement. At trial a jury was impaneled and sworn. The trial court heard the testimony of one prosecution witness, Mr. James Alexander, President of Kay's Ice Cream Company, the victim of the alleged embezzlement. Alexander testified that defendant Knight picked up ice cream products at the Kay's plant in Knoxville before servicing his route, which was in Blount County. The two supermarkets to whom

Knight allegedly presented false tickets were in Blount County. The originals of the tickets were then turned in at the home office in Knoxville at the end of the day.

Mr. Alexander was cross-examined, then excused. At this point in the trial the judge asked the jury to step

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out of the courtroom and stated that he would like to "hear from the attorneys" on the question of venue. The prosecutor, Mr. Gill, then presented argument that venue in Knox County was proper. Defense attorney Bell spoke next, but side-stepped the venue issue, and urged a judgment of acquittal under Rule 29, Tenn. R. Crim. P., because of an alleged variance between the elements alleged in the indictment and shown by the State's proof.

The State argues that the following remarks of defendant's Attorney Bell were equivalent to a motion to dismiss:

> "Now he cannot show that any of these elements happened in Knox County, Tennessee. We say the State hasn't got a case in Blount or Knox County as a result of this indictment . . . ."

Placed in the context of Mr. Bell's whole argument, however, which plainly centered on the supposed defects in the indictment and urged a termination of the case on another ground entirely, this remark does not, in my opinion, amount to a motion to dismiss because of improper venue.

The court stated, after responding to Mr. Bell's Rule 29 motion:

> "I don't believe that the State has proved venue in Knox County but it has proved venue in Blount County. Because of what, *without even a motion*,

> the Court would have to say that we are in the wrong county trying this." (Emphasis added.)

The court heard further argument from the State on the venue issue. Interspersed in the State's colloquy with the court were three renewals by the defense of its motion for judgment of acquittal. The judge finally declared that he was going to "sustain the motion," apparently referring to his own motion

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for dismissal rather than Mr. Bell's Rule 29 motion for acquittal. Mr. Bell then stated: "Your Honor, we are insistent that the court enter a judgment of acquittal." The court replied:

> "I am not going to enter a judgment of acquittal. I'm going to dismiss the case on the fact that the State is in the wrong [county]."[1]

Mr. Bell again argued for judgment of acquittal, but the trial judge, holding that the indictment alleged all of the elements of embezzlement by an employee under T.C.A. § 39-4232, repeated his intention to dismiss because of improper venue. Attorney Bell then said:

> "The defendant excepts to the Court's ruling, not as to the venue question, but as to the indictment."

The defense did not at any time formally object to the dismissal of the indictment for improper venue.

Some narrow exceptions to the prohibition against double jeopardy are made when "there is a manifest necessity for the [dismissal], or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). The Supreme Court has cautioned that "The power ought to be used with

the greatest caution, under urgent circumstances and for very plain and obvious cases." *Id.*

Retrial is permissible if the defendant has actively sought or consented to the premature termination of the

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[1] Double jeopardy principles governing mistrials apply to cases where an indictment is dismissed. A mid-trial dismissal was said to be "functionally indistinguishable from a declaration of a mistrial." **Lee v. United States**, 432 U.S. 23, 31 (1977).

[4]

proceedings.[2] *United States v. Scott*, 437 U.S. 82 (1978); *Seiber v. State*, 542 S.W.2d 381, 385 (Tenn. Crim. App. 1976), *cert. denied*, *id.* In *United States v. Scott*, *supra*, counsel moved to dismiss two counts of an indictment on the grounds that defendant was prejudiced by preindictment delay, and the motion was granted at the end of trial; a subsequent trial for those charges was not barred.[3] Similarly, in *Jeffers v. United States*, 432 U.S. 137 (1977), where the prosecutor moved to consolidate indictments and the defendant successfully opposed the motion, trial under one indictment was permitted following trial and a finding of guilt under the other. In *Lee v. United States*, 432 U.S. 23 (1977), after the prosecutor's opening statement in a bench trial the defendant moved for a dismissal of the indictment because it failed to allege the requisite specific intent. The judge responded that he needed to study the law. The trial proceeded, and at the close of the evidence the judge granted defendant's motion. Because counsel had requested the dismissal and had not objected to completing the trial, the court ruled that defendant had chosen not to exercise his protection against double jeopardy. *Id.* at 32-33.

But, the instant case does not fall into the category of those just discussed, because defense counsel neither

sought nor consented to dismissal for lack of venue. The thrust of counsel's argument was that there was a fatal

---

[2]Even if at the time defense counsel purports to "consent" to termination of the proceedings, however, retrial will be barred if the cause of the ruling was conduct by the prosecutor or judge that rises to the level of overreaching, harassment, or bad faith. **Lee** v. **United States**, 432 U.S. 23, 34 (1977); **United States** v. **Dinitz**, 424 U.S. 600, 611 (1976); **United States** v. **Jorn**, 400 U.S. 470, 485 (1971).

[3]The jury found defendant not guilty of the third count in the indictment. 437 U.S. 84.

[5]

variance between the indictment and the proof respecting certain elements of the offense that justified an acquittal. The only evidence in the record that could arguably be construed as consent to the dismissal is counsel's statement at the conclusion of the following exchange:

"[Defense attorney]: If the court would point out the elements of embezzlement reflected in this indictment—that is the indictment of the State of Tennessee vs. Arlie Knight—

"The Court: I've already done that and I'm not going to rule on it. In fact, I'm going to deny your motion for judgment of acquittal and proceed on another theory that I have presented, that the indictment is good but the trouble is that the proof shows that the events occurred in Blount County . . . .

"[Defense attorney]: All right. Now can we do this, can we let the record reflect that a jury was sworn and that the—

"[Prosecutor]:	The record already reflects that.
"The Court:	It would already reflect that.
"[Defense Attorney]:	That traditionally, we—
"The Court:	I'm going to call them in here and dismiss them and tell them why I'm dismissing them, too. All right, bring the jury back in.
"[Prosecutor]:	Your Honor, the State excepts and prays for an appeal.
"[Defense Attorney]:	The defendant excepts to the Court's ruling, ***not as to the venue question, but as to the indictment.***" [Emphasis added.]

The quoted discussion terminated a disagreement that was lengthy and fast-moving. Each party was insistent on his position: that prosecutor that venue was proper, the judge that venue

[6]

was improper, and the defense that a variance required an order of acquittal. Counsel renewed, four times, his motion for judgment of acquittal, which was denied. Viewed in this context, I conclude that the statements made by defense counsel did not amount to consent to the dismissal for lack of venue.

Nor do I consider that defense counsel's failure to voice a formal objection to the court's dismissal amounted to consent, given the position expressed by counsel and the fast-moving context in which the entire colloquy took place. *See People v. Johnson*, 396 Mich. 424, 240 N.W.2d 729, *cert. denied*, 429 U.S. 951)1976) (silence by defense counsel did not amount to consent by defendant); *State v. Sedillo*,

88 N.M. 240, 539 P.2d 630 (N.M. App. 1975) (counsel assumed objection would be useless under the circumstances); 1 Wharton's Crim. Law, § 62. In this respect the case is analogous to *United States v. Jorn*, 400 U.S. 470 (1971), a tax evasion case in which the judge, *sua sponte*, dismissed the proceedings mid-trial because he feared that several witnesses might be implicated in the case and might not have been adequately warned of their constitutional rights. In that case, too, the dialogue preceding the court's ruling was fast-paced and the counsel were interrupted several times by the judge. 470 U.S. at 487. The Supreme Court stated in *Jorn*,

> "[I]ndeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so."
>
> *Id.*

[7]

Despite the fact that, as in the instant case, no formal objection was made to the dismissal in the initial trial, the court ruled that a second trial was prohibited.[4] *Id.*

Moreover, in the case at bar defense counsel brought the double jeopardy issue to the court's attention in his statements concerning the jury, quoted above, and by the following statement,

> "We say that the State hasn't got a case either in Blount County or Knox County as a result of this indictment because jeopardy has attached . . . ."

It is my opinion that counsel's failure to make a formal objection did not amount to consent to the dismissal.

I would hold that the double jeopardy clauses of the Tennessee and United States Constitutions preclude subjecting this defendant to a second trial, his first having been terminated without a verdict, through no fault of his own.

/s/ RAY L. BROCK, JR.
BROCK, J.

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[4] Justice Harlan wrote the opinion for a plurality of four. Two justices thought that the Court lacked jurisdiction because the trial judge's actions amounted to an acquittal, but joined the judgment of the Court to create a majority. 400 U.S. at 488.

(Filed February 15, 1980)

IN THE COURT OF CRIMINAL APPEALS
AT KNOXVILLE

NOVEMBER 1979

STATE OF TENNESSEE, APPELLANT	)	No. 612, Knox Criminal
VS:	)	Honorable Joseph J. Nigro, Judge
ARLIE KNIGHT, ALIAS, APPELLEE	)	(Dismissal of Indictment)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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Knoxville, Tenn.

REVERSED AND REMANDED FOR TRIAL

LLOYD TATUM, JUDGE

OPINION RELEASED: FEB 15 1980

Court of Criminal Appeals Opinion

OPINION

This is an appeal by the State from a judgment of the trial court dismissing the indictment, for lack of venue, after the beginning of the trial. The defendant, Arlie Knight, was indicted for the crime of embezzlement in violation of T.C.A. §39-4232 and was on trial for that offense when the trial judge, after hearing a portion of the State's evidence, found that venue was not in Knox County, and dismissed the indictment. The only issue presented for review is whether the trial court erred in dismissing the indictment for lack of venue.

Before reaching the merits of the case, we must resolve the threshold question of whether the State has a right to appeal the trial court's judgment. The facts germane to this question are that after the jury was selected and sworn, the State introduced, as a witness, the president of the victim corporation, Kay's Ice Cream Company. After the conclusion of the testimony of this witness, the court invited argument from counsel on the question of whether venue was in Knox County. During the ensuing colloquy, the defendant urged the court to dismiss the indictment for lack of venue and for a fatal variance in the indictment and proof. The trial court sustained the motion as to the venue question, but denied the motion as to the other question. The defendant excepted "to the court's ruling, not as to the venue question, but as to the indictment." Whereupon, the trial court entered a judgment dismissing the indictment on the grounds that there was no evidence of venue in Knox County and that the crime, if any, was committed in Blount County.

[2]

The defendant contends that a reversal of the lower court's judgment and a retrial is prohibited because it

would put him twice in jeopardy and thus would violate Article I, Section 10 of the Constitution of Tennessee and the Fifth Amendment to the United States Constitution.

We think that the recent decision of the United States Supreme Court in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), resolves this question adversely to the defendant. Scott was charged in a three-count indictment. At the close of all the evidence, the District Court granted Scott's motion to dismiss two counts of the indictment on the ground that his defense had been prejudiced by pre-indictment delay. The jury acquitted Scott on the third count and the government sought to appeal the court's dismissal of the first two counts. The United States Court of Appeals for the Sixth Circuit, relying on *United States v. Jenkins*, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), concluded that any further prosecution of Scott was barred by the double jeopardy clause of the Fifth Amendment and dismissed the government's appeal. The United States Supreme Court reversed the Court of Appeals and expressly overruled *United States v. Jenkins*, holding that when a defendant obtains the dismissal of an indictment during trial on ground unrelated to guilt or innocence, a retrial is not prohibited on constitutional grounds. The *Scott* court said:

> "Our decision in *Jenkins* was based upon our perceptions of the underlying purposes of the Double Jeopardy Clause, see *ante*, at 2192:
>
> [3]
>
> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be al-

> lowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .' *Jenkins*, *supra*, 420 U.S., at 370, 95 S.Ct., at 1013, quoting *Green*, *supra*, 355 U.S., at 187, 78 S.Ct., at 223.

Upon fuller consideration, we are now of the view that this language from *Green*, while entirely appropriate in the circumstances of that opinion, is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution. It is quite true that the Government with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense. This truth is expressed in the three common-law pleas of *a utre fois acquit*, *a utre fois convict*, and pardon, which lie at the core of the area protected by the Double Jeopardy Clause. As we have recognized in cases from *Ball*, *supra*, to *Sanabria v. United States*, No. 76-1041, ___U.S. ___, 98 S.Ct. 2170, 55 L.Ed.2d ___, a defendant once acquitted may not be again subjected to trial without violating the Double Jeopardy Clause.

But that situation is obviously a far cry from the present case, where the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empaneled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a

picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *United States v. Scott*, 98 S.Ct. 2196.

[4]

The rule is firmly entrenched that when a first trial is terminated because a defendant instigated or acceded to its dismissal, then the defendant cannot rely upon the defense of double jeopardy at the second trial. *Lee v. United States*, 432 U.S. 23, 97 S.Ct. 2141, 2147, 52 L.Ed.2d 80 (1977); *Seiber v. State*, 542 S.W.2d 381, 385 (Tenn. Cr.App. 1976); *Donaldson v. Rose*, 525 S.W.2d 853, 855 (Tenn. Cr. App. 1975).

Venue is not an element of a criminal offense. The State must prove venue to establish jurisdiction of the court, but the State is not required to prove venue in order to establish defendant's guilt of the crime for which he is being tried; venue has no bearing on the defendant's guilt or innocence. See *Harvey v. State*, 213 Tenn. 608, 612, 376 S.W.2d 497, 498 (1964); *Norris v. State*, 127 Tenn. 437, 440, 155 S.W. 165 (1913); *State v. Quartemus*, 50 Tenn. 65, 66 (1870); *Wright v. State*, 2 Tenn.Cr.App. 95, 98-99, 451 S.W.2d 707, 709 (1969). Thus, the trial court's resolution of the venue issue was in no way a determination of the factual elements of the offense of embezzlement; the defendant was not acquitted.

For the foregoing reasons, we hold that the dismissal of the indictment during trial with the defendant's consent does not constitute jeopardy in a constitutional sense and that a retrial of the defendant is not prohibited by the double jeopardy provisions of either the State or Federal constitution.

T.R.A.P. Rule 3(c) permits the State to appeal from a judgment when:

"(1) the substantive effect of which results [5] in dismissing an indictment, information, or complaint. . ."

Also see T.C.A. §§40-3401 and 40-3403 which permit an appeal by the State in criminal cases except upon a judgment of acquittal. We hold that under Rule 3(c), (1) T.R.A.P., the State may appeal the judgment of the trial court dismissing the indictment.

Addressing the merits, we first observe that it is error for the trial judge to make a factual determination and dismiss an indictment without first giving the State an opportunity to fully develop its evidence. See generally Rule 29, Rules of Criminal Procedure. Aside from that, the evidence given by the State's witness who testified did not establish that venue was not properly laid in Knox County. Mr. James S. Alexander, President of Kay's Ice Cream Company, testified that the defendant was a company employee who had a sales route in Blount County. Kay's Ice Cream Company is headquartered in Knox County.

Customarily, the defendant procured products at the company plant in Knox County in a company truck for delivery to customers in Blount County. It was his duty to

give the customer a carbon copy of a ticket itemizing products sold and the cost of these products. The original ticket was given to the company officials in Knoxville. During the period from January, 1978, to June, 1978, the defendant turned in numerous false original tickets to the company which differed from the copy delivered to two of his customers. The copies, on many occasions showed delivery of more merchandise than was reflected on the original tickets returned to the company. The additional merchandise

[6]

was written with a pen on the carbon copy that was delivered to the customers. There was a discrepancy of $1,207.95 in merchandise delivered at Biven's Market and $1,615.59 in merchandise delivered to Sterling Market. This discrepancy included tickets delivered to these two customers with no corresponding original ticket turned into the company; these tickets represented cash sales. It was the defendant's duty to account for the cash from his sales with the company in Knoxville.

The defendant did not deliver the money for the sales not shown on the original tickets turned into the company.

In *State v. Oliver*, 175 Tenn. 624, 136 S.W.2d 722, 723 (1940), the Supreme Court, speaking through Chief Justice Green, said:

> "As noted in Hill v. State, 159 Tenn. 297, 17 S.W.2d 913, embezzlement and fraudulent breach of trust are kindred offenses, although distinct under our statutes. Whether the one offense or the other has been committed is determined by the manner in which the property converted came into the hands of the defendant. Fraudulent appropriation is the essence of each

offense. In so far as the fraudulent appropriation consists in the failure to account, jurisdiction would naturally be determined by the same rule in a prosecution for one offense as in the prosecution for the other offense.

This being so, the State insists that the matter of jurisdiction is settled by Lambeth v. State, 3 Shann.Cas. 754. In that case an express messenger on a train running through Mississippi into Memphis, Tennessee, received packages and converted them to his own use in Mississippi. He was indicted in Memphis and it was urged that the court in Memphis did not have jurisdiction of the offense. This court, however, sustained the jurisdiction because it said the fraudulent appropriation was a continuous transaction until the defendant came within the jurisdiction of the court at Memphis, where it ripened into the crime of embezzlement upon his failure to account for the converted packages at the Memphis agency.

[7]

In addition, we have Code, §11475, providing that where an offense 'is committed partly in one county and partly in another, or the acts or effects thereof constituting or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county.'

The argument for the State is that it was the duty of the defendant here to account for the automobile involved or its proceeds in Roane County and consequently the court in that county had jurisdiction. We are referred to a number of decisions in which it has been held that a prosecution for an offense similar to this might be main-

> tained in a county where it was the duty of a defendant to account, although the conversion took place in another county. Such we believe to be the general rule...."

There were peculiar facts in the *Oliver* case that took it out of the general rule above enunciated; however, there is no indication from the one witness who testified that these unusual facts are present in the case *sub judice*. The Supreme Court also dealt with the venue question in embezzlement cases when considering *State v. Cate*, 199 Tenn. 195, 285 S.W.2d 343, 346 (Tenn. 1955), and held:

> "...the petitioner qualified as executor in the appropriate court of Buncumbe County, North Carolina. It is to that court alone that he was required to make settlement and to produce the trust funds in his hands. His duty to account is in the State of North Carolina and the county in which he qualified and if he did convert these trust funds in Tennessee, it constituted an act resulting in the crime of embezzlement in the State of North Carolina, where he was duly bound to account for the funds in his hands. Lambeth v. State, 3 Shann.Cas. 754; State v. Oliver, 175 Tenn. 624, 627, 136 S.W.2d 722."

Based on the above authorities, and those cited therein, we hold that a prosecution for violation of

[8]

T.C.A. §39-4232 may be maintained in a county where it was the duty of a defendant to account, although the actual conversion might have taken place in another county.

It follows that the judgment of the lower court is reversed and this case is remanded for trial.

/s/ LLOYD TATUM
Lloyd Tatum, Judge

CONCUR:

/s/ JOHN K. BYERS
JOHN K. BYERS, JUDGE

/s/ ALLEN R. CORNELIUS, JR.
ALLEN R. CORNELIUS, JR., JUDGE

Filed May 11, 1981
John A. Parker, Clerk

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1980

STATE OF TENNESSEE, Plaintiff-Appellee	)	S/C No. 153 - Knox Criminal (No. C7076)
Vs.	)	(Appeal by State from Dismissal of Indictment)
ARLIE KNIGHT, Defendant-Appellant	)	AFFIRMED COURT OF CRIMINAL APPEALS, WHICH REVERSED THE JUDGMENT OF THE TRIAL COURT AND REMANDED CASE TO THE TRIAL COURT FOR TRIAL

JUDGMENT ORDER

Came the Appellant, Arlie Knight, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon con-

sideration thereof this Court is of the opinion that there is no error in the judgment of the Court of Criminal Appeals and that its judgment should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by the Court that the judgment of the Court of Criminal Appeals, which reversed the judgment of the lower court and remanded the case to the trial court for trial, is affirmed. A copy of this Court's Opinion will accompany the procedendo on the remand to the court below.

Costs incident to the appeal are taxed to the Appellant, Arlie Knight, for which let execution issue. All other costs will abide the results in the trial court.

William J. Harbison, C.J.
Wm. H. D. Fones, J.
Robert E. Cooper, J.
Frank F. Drowota, III, J.

Dissents:
Ray L. Brock, Jr., J.

It follows that the judgment of the lower court is reversed and this case is remanded for trial.

/s/ LLOYD TATUM
Lloyd Tatum, Judge

CONCUR:

/s/ JOHN K. BYERS
JOHN K. BYERS, JUDGE

/s/ ALLEN R. CORNELIUS, JR.
ALLEN R. CORNELIUS, JR., JUDGE

Filed May 11, 1981
John A. Parker, Clerk

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM 1980

STATE OF TENNESSEE, Plaintiff-Appellee	)	S/C No. 153 - Knox Criminal (No. C7076)
Vs.	)	(Appeal by State from Dismissal of Indictment)
ARLIE KNIGHT, Defendant-Appellant	)	AFFIRMED COURT OF CRIMINAL APPEALS, WHICH REVERSED THE JUDGMENT OF THE TRIAL COURT AND REMANDED CASE TO THE TRIAL COURT FOR TRIAL

JUDGMENT ORDER

Came the Appellant, Arlie Knight, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon con-

(Filed June 8, 1981)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

For Publication

STATE OF TENNESSEE,)
Plaintiff-Appellee)
)
Vs.) Knox Criminal
)
ARLIE KNIGHT,)
Defendant-Appellant.)

ORDER ON PETITION FOR REHEARING

A petition for rehearing has been filed in the above case on behalf of appellant Arlie Knight. After consideration of same, the Court is of the opinion that the petition is not well taken and the same is accordingly denied at his cost.

Justice Brock adheres to the views expressed in his original dissenting opinion filed in this cause.

Enter this 8th day of June , 1981.

/s/ WILLIAM J. HARBISON
William J. Harbison, C.J.

Fones, Cooper and Drowota, JJ., concur.

(Filed June 17, 1981)

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE, Appellee	)	
VS.	)	S/C No. 153
	)	KNOX CRIMINAL
ARLIE KNIGHT, Appellant	)	

ORDER

This cause came on to be heard upon the Petition of Arlie Knight to Stay or Recall Mandate and the Court, having considered the Petition, finding that the appellant Knight does in fact intend to seek review of the Court's decision in the Supreme Court of the United States, and further, that a stay of the Mandate is necessary in order to protect appellant's interest in this cause, it is, therefore, ORDERED that a stay of the Mandate be entered until the appeal of the above-styled cause to the United States Supreme Court is concluded or until such time as the period in which to perfect an appeal to the United States Supreme Court has expired.

ENTER this 17 day of June, 1981.

/s/ WILLIAM J. HARBISON
JUDGE

APPROVED FOR ENTRY:

/s/ JAMES A. H. BELL
James A. H. Bell
TIPTON & BELL
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Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS
CLERK

No. 81-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARLIE KNIGHT
Petitioner,

vs.

STATE OF TENNESSEE
Respondent.

On Petition For Writ of Certiorari to the
Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER THE TRIAL JUDGE'S MIDTRIAL DISMISSAL FOR LACK OF VENUE, AN ISSUE WHICH DOES NOT INVOLVE THE RESOLUTION OF ANY OF THE FACTUAL ELEMENTS OF THE CRIME CHARGED, BARS RETRIAL OF PETITIONER UNDER THE FIFTH AND FOURTEENTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-237

ARLIE KNIGHT
Petitioner,

vs.

STATE OF TENNESSEE
Respondent.

On Petition For Writ of Certiorari to the
Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Court of Criminal Appeals of Tennessee was entered on February 15, 1980. The Supreme Court of Tennessee affirmed the judgment of the Criminal Court of Appeals on May 11, 1981 and denied petitioner's petition for rehearing on June 8, 1981. Petitioner filed this petition for writ of certiorari with the court on August 5, 1981.

STATEMENT OF THE CASE

Arlie Knight was indicted for embezzlement by the Knox County Grand Jury on April 3, 1979. After presentation of the state's first witness, the trial court judge ordered a dismissal of the indictment for lack of proof establishing venue in Knox County.

The State of Tennessee appealed to the Court of Criminal Appeals which on February 15, 1980 reversed the trial court and remanded the case for trial. The court held that the state had the right to appeal the trial court judgment under Tenn. R. App. P. 3(c)(1). As the defendant was found to have instigated or acceded to the dismissal, he could not then rely on the defense of double jeopardy. The court further held that the resolution of the venue issue was not a determination of the factual issues of the offense of embezzlement, and, thus, the action of the court did not amount to an acquittal. Turning to the merits, the court found that the dismissal was made in error, and that what little evidence as was allowed by the trial judge would have properly established venue in Knox County.

On March 5, 1980, the petitioner applied for permission to appeal to the Tennessee Supreme Court. Permission was granted on April 21, 1980. On May 11, 1980, the Supreme Court filed an opinion affirming the opinion of the Court of Criminal Appeals. The court found that the offense could have occurred in Knox County as elements of the crime of embezzlement occurred or continued to exist there. The case, therefore, had been incorrectly dismissed. The court agreed that this case is governed by *United States* v. *Scott,* 437 U.S. 82 (1978), and that the petitioner, though he had not moved for dismissal on the basis of lack of venue, had not objected to the trial court's action in so acting, but had at one point, "concurred . . . and urged that no elements of the crime had been shown to have been committed in the county where the indictment was returned." The

court further held that the motion for acquittal on grounds of material variance was "as improper as the action of the trial judge, inasmuch as the state had not closed its case." These grounds would not prevent a retrial.

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the Court of Criminal Appeals' reversal of the trial court judgment which had dismissed the indictment for lack of venue. Petitioner insists that a retrial would violate the prohibition of the Double Jeopardy Clause. However, in reversing the trial court's decision, it was found that the dismissal did not amount to an acquittal, that petitioner had acceded to this dismissal and that double jeopardy would not bar petitioner's retrial. No federal question not heretofore determined by this court is raised. There being no special and important reasons for a grant of certiorari in this case, the court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I

The Improper Dismissal Of The Indictment By The Trial Court Judge On The Ground Of Lack Of Venue Did Not Constitute An Acquittal And Therefore Bar Retrial Of The Petitioner.

Venue establishes the appropriate location for the exercise of a court's jurisdiction for the adjudication of a particular case. *Harvey* v. *State,* 213 Tenn. 608, 612, 376 S.W.2d 497, 498 (1964). Venue must be shown by the state by a preponderance of the evidence. *State* v. *Bennett,* 549 S.W.2d 949, 949 (Tenn. 1977). *Hooper* v. *State,* 205 Tenn. 246, 252, 326 S.W. 2d 448, 451 (1959).

As the trial record indicates, the state had sufficiently proven that venue lay in Knox County, Tennessee. The petitioner was found to have a duty to account, an element of the crime of embezzlement, in that county. *State* v. *Oliver,* 175 Tenn. 624, 627, 136 S.W.2d 722, 724 (1940). Further, an intent to perform the crime may have occurred in Knox County. *Hooper* v. *State,* 205 Tenn. at 252-254, 326 S.W.2d at 451-452. Thus, venue would have been proper in Knox County.

Petitioner contends that lack of venue may result in an acquittal.[1] Venue is not, however, an element of a criminal offense. *Hopson* v. *State,* 201 Tenn. 337, 343, 299 S.W.2d 11, 14 (1957). Petitioner offers the analogy of entrapment. This is distinguishable, as entrapment, unlike venue, is a factual affirmative defense going to the accused's criminal culpability. *United States* v. *Scott,* 437 U.S. 82, 98 (1978).

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[1] It is a well-established rule that a judgment of acquittal bars a subsequent retrial by the Government. *United States* v. *Ball,* 163 U.S. 662, 671 (1896). *Fong Foo* v. *United States,* 369 U.S. 141, 143 (1962). *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977).

The effect of the trial court's action here was that of a dismissal of the indictment. Tenn. R. App. P. 3(c) is the statutory authorization giving the state an appeal as of right, it provides, in pertinent part:

> In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; . . . .

In ruling on the venue issue, the trial judge did not reach the merits of the case; there was no determination of a factual issue bearing on the petitioner's guilt or innocence. Acquittal occurs only when "the ruling of the judge, whatever its label, actually represents a resolution (in the defendant's favor), correct or not, of some or all of the factual elements of the offenses charged." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). *Lee* v. *United States,* 432 U.S. 23, 30 (1977).

This court has found that an appeal is not barred simply because a ruling in favor of the defendant "is based upon facts outside the face of the indictments." *United States* v. *Wilson,* 420 U.S. 332, 348 (1975). Thus, this issue does not warrant the granting of certiorari.

II.

Since Petitioner Asserted Lack Of Venue And Acceded To The Dismissal On This Basis, The Double Jeopardy Clause Does Not Bar Retrial.

Though no acquittal is involved in this case, there are still double jeopardy[2] ramifications to consider, as jeopardy had attached. *Crist* v. *Bretz,* 437 U.S.28 (1978). The recent case of

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[2] United States Const., amend. v, XIV; Tenn. Const., Art. I, §10.

United States v. *Scott,* 437 U.S. 82 (1978) is dispositive of circumstances, such as here, where a trial is terminated favorably to the defendant, but on a basis not related to factual guilt or innocence.

It is agreed that the trial court acted "sua sponte" in raising the venue question. However, it was found that petitioner asserted that no elements of the crime had been shown to have occurred in Knox County.[3] Further, he did not object to the trial court's ruling-conduct found to be consent to the dismissal of the indictment for improper venue, thus relinquishing the right to a trial on the merits.

Where defendant moves for a midtrial dismissal or consents to its declaration, ordinarily the Double Jeopardy Clause does not bar his retrial. *United States* v. *Scott, supra,* 437 U.S. at 93; *Lee* v. *United States, supra,* 432 U.S. at 32; *United States* v. *Jorn,* 400 U.S. 470, 485 (1971) (plurality opinion). Under these circumstances petitioner has not been deprived of his right to a jury; further, no interest protected by the Double Jeopardy Clause is invaded when the government is allowed to appeal and seek a reversal of such a mistrial determination. *United States* v. *Scott,* 437 U.S. at 98-99.

Since the Tennessee Supreme Court decided this issue in accord with the prior decisions of this court, petitioner has not raised an issue warranting the grant of certiorari.

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[3] The petitioner did request judgment of acquittal on the ground of a variance. The Tennessee Supreme Court held that this would not have prevented a retrial had it been granted. *See, State* v. *Brooks,* 224 Tenn. 712, 462 S.W.2d 491 (1970); appeal dismissed sub nom. *Duncan* v. *Tenn.,* 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed. 2d 86 (1972). *Wilson* v. *State,* 200 Tenn. 309, 292 S.W.2d 188 (1956).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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